United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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76-7564

To be argued by
JOHN M. SPEYER

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALBERT L. BAILEY, JR. and BARBARA J. BAILEY,
Plaintiffs-Appellants,

—against—

HARTFORD FIRE INSURANCE CO.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLEE'S BRIEF

GREENHILL & SPEYER
Attorneys for Defendant-Appellee
56 Pine Street
New York, N.Y. 10005
943-1550

JOHN M. SPEYER
MICHAEL E. GORELICK
Of Counsel

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ARGUMENT

With all due respect to appellants and this Court, appellee believes it is unnecessary and inappropriate to make a point by point response to appellants' brief. The relevant points have been fully covered in Judge Dooling's comprehensive decision, and the others are, at most, peripheral.

However, a brief clarification of two aspects may be in order:

1. "Collapse". The District Court properly held that the report of plaintiffs' engineer failed to show that any "collapse" had occurred. Rather the foundation wall was found merely to be cracked, with two large vertical cracks being visible.

Although the District Court apparently felt it was self-explanatory, it should be noted that plaintiffs' engineer's

statement that "partial collapse of the dwelling has already occurred" appears to be just a very loose use of the term, based on the cracks in the foundation wall, his opinion of the imminence of a collapse, and an apparent enthusiasm for plaintiffs' cause. It is clear from the rest of his report (9a-12a)* and from the photos attached to the original moving affidavits (25a-27a) that the building has in no way fallen or collapsed. Opinion testimony is not admissible as to observations which can be made by laymen; the external appearance of the wall here is readily observable by a layman. Thus the engineer's opinion extends only to the cause of the condition observed.

It is the function of the Court, and not a witness, to determine coverage from a description of the condition. Under the circumstances Judge Dooling came to the only possible conclusion, to wit: that no collapse had occurred and that, as a matter of law, there was no coverage.

2. "Summary Judgment". Although it is true that the drastic relief of summary judgment is not generally favored by this Court, it is also true that in a proper case it will lie. [For the proper function of the summary judgment motion see, for example, *Dressler* v. *M.V. Sandpiper*, 331 F.2d 130, 134 (2d Cir. 1964.)]

It is still a fundamental maxim that on a motion for summary judgment, the Court cannot try issues of fact; it can only determine whether or not there are issues to be tried. *Cali* v. *Eastern Airlines Inc.*, 442 F. 2d 65, 71 (2nd Cir. 1971). In accordance with that maxim, the District Court here properly found that there was no dispute as to the controlling facts and that, as a matter of law, defendant must prevail. In such a case, the granting of

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* Numerals refer to pages in Joint Appendix.

defendant's motion for summary judgment was correct and required.

As this Court said in *Bassis* v. *Universal Line, S.A.*, 436 F. 2d 64 (2d Cir. 1970):

> "The parties here evinced a desire, which they fulfilled, to place before Judge Dooling all relevant facts essential to a determination of their controversy. A review of the record does not disclose issues of material facts which remain to be explored. Summary judgment was the correct path for him to follow." (at p. 68).

Here, as in *Bassis,* Judge Dooling was faced with a perfect situation for summary judgment and properly granted defendant's motion.

CONCLUSION

The order of the District Court granting summary judgment in favor of defendant and dismissing the complaint was proper and must be affirmed.

Respectfully submitted,

GREENHILL & SPEYER
Attorneys for Defendant-Appellee

JOHN M. SPEYER
MICHAEL E. GORELICK
Of Counsel